No. 80-942

Supreme Court, U.S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1980

JOHN M. SHAHEEN,

Petitioner,

against

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK (HONORABLE RICHARD OWEN, UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF NEW YORK),

Respondent.

MEMORANDUM IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JEFFREY BARIST
Attorney for Respondent
The Clarkson Company Limited
14 Wall Street
New York, New York 10005

EDNA R. SUSSMAN
KEVIN D. ASHLEY
WHITE & CASE
Of Counsel

January 7, 1981

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1980

No. 80-942

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-against-

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK (HONORABLE RICHARD OWEN, UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF NEW YORK),

Respondent,

MEMORANDUM IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner seeks to have this Court grant its petition for a writ of certiorari on the ground that the District Court for the Southern District of New York denied petitioner's motion to

dismiss a pleading and that the Court of Appeals for the Second Circuit declined to issue a writ of mandamus reversing the District Court.

Denial of motions under Rule 12(b)6 are not reviewable by mandamus, a "drastic" remedy invoked only in "extraordinary situations . . . " Allied Chemical Corp. v. Daiflon, Inc., 101 S. Ct. 188, 190 (1980). Petitioner alleged a deficiency in the form of a petition for a turn-over order under New York state law. (See Petitioner's Appendix 9a-17a) The alleged deficiency was later cured. Ultimately, the purported pledgee, Macmillan Ring-Free Oil Company, Inc., who petitioner asserts should have been named in the initial pleading, was brought in and the claims of all parties were fully set forth in appropriate pleadings, including respondent's claim that the pledge was invalid and a fraudu-

lent conveyance. See Respondent's Appendix hereto and particularly RA26-RA27. Thus subsequent pleadings made petitioner's objection a technical one as to which pleading should have contained the allegations claimed to be requisite. Moreover, since the filing of the petition with this Court a trial was held. The parties have presented their proof and arguments to the District Court, which reserved decision. Any question presented by the petition is moot.

WHEREFORE, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Dated: New York, New York
January 7, 1981

Respectfully submitted,

JEFFREY BARIST
Attorney for Respondent
The Clarkson Company
Limited*
14 Wall Street
New York, New York 10005
(212) 732-1040

EDNA R. SUSSMAN
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White & Case
Of Counsel

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* All of the shares of The Clarkson Company Limited ("Clarkson") are owned by Clarkson Gordon, a partnership. Clarkson has no subsidiaries. Woods Gordon, a partnership, is the only affiliate of Clarkson.

APPENDIX

APPENDIX

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[CAPTION OMITTED] ANSWER

The respondent, John M. Shaheen, by his attorney, Saxe, Bacon & Bolan, P.C., for his answer to the Petition, states the following:

1. Admitted.

2. Admits each and every allegation but denies that petitioner has standing to commence this action in New York.

3. Denies knowledge and information sufficient to form a belief.

4. Admitted.

5. Admitted.

6. Admitted to the extent that such an adjudication in bankruptcy occurred.

7. Admitted.

8. The Court's attention is respectfully directed to a copy of judgment annexed hereto as Exhibit "A" for its terms. Respondent denies knowledge and

information sufficient to form a belief as to whether any part of the judgment has been paid.

9. Admits upon information and belief that Martin Rubin is in possession of the shares of stock hereinafter listed, but denies that respondent, John M. Shaheen has a possessory interest in said stock.

10. Denies knowledge and information sufficient to form a belief.

AS AND FOR A FIRST SEPARATE AND DISTINCT DEFENSE

11. The complaint fails to state a claim upon which relief can be granted.

AS AND FOR A SECOND SEPARATE AND DISTINCT DEFENSE

12. The complaint fails to join all necessary parties.

AS AND FOR A THIRD SEPARATE AND DISTINCT DEFENSE

13. On or about March 29th, 1977, respondent, John M. Shaheen entered into

a written agreement guaranteeing certain debts owed to the Macmillan Ring-Free Oil Co., Inc. Those debts and the respective debtors are listed in the guarantee, a copy of which is annexed hereto as Exhibit "B".

14. Pursuant to said guarantee, John M. Shaheen secured payment of said debts by pledging and giving a security interest in certain shares of stock which he owned, to Macmillan. Said collateral was delivered to Martin Rubin, as escrowee.

15. Pursuant to the guarantee, John M. Shaheen has no present possessory interest in said stock.

AS AND FOR A FOURTH SEPARATE AND DISTINCT DEFENSE

16. Said debts were guaranteed by John M. Shaheen to ensure payment of legitimate business debts incurred by various companies and owed to Macmillan.

AS AND FOR A FIFTH SEPARATE AND DISTINCT DEFENSE

17. Petitioner is precluded from taking possession and control of the subject stock pursuant to Section 310 of the Communication Act of 1934.

WHEREFORE, the respondent demands judgment dismissing the Petition, together with the costs and disbursements of this proceeding.

DATED: New York, New York
October 24th, 1980

SAXE, BACON & BOLAN, P.C.
Attorneys for Respondent,
John M. Shaheen

By: /s/ Thomas A. Andrews
THOMAS A. ANDREWS
39 East 68th Street
New York, New York 10021
(212) 472-1400

[EXHIBITS OMITTED]

[CAPTION OMITTED]

COMPLAINT AND COUNTERCLAIM FOR INTERPLEADER

Respondent-counterclaimant Martin Rubin ("Rubin"), by his attorneys, Kornstein Meister & Veisz, complains and counterclaims for interpleader as follows:

1. Rubin is a member of the Bar of this Court and a citizen of the State of New York, residing at 85 Dorchester Road, Rockville Centre, New York.

2. Counterclaim defendant Macmillan Ring-Free Oil Co., Inc. ("Macmillan") is a Delaware corporation with its headquarters and principal place of business located at 90 Park Avenue, New York, New York.

3. Counterclaim defendant the Sheriff of the City of New York, New York County Division ("Sheriff"), is a citizen of the state of New York.

4. Petitioner, The Clarkson Company Limited ("Clarkson"), as Trustee in Bankruptcy, appointed by the Supreme Court of the Province of Newfoundland, of the Property of Newfoundland Refining Company Limited and Provincial Refining Company Limited, is a corporation organized and existing under the laws of the Province of Ontario, Canada, where it maintains its principal place of business.

5. This is a complaint and counterclaim for interpleader or in the nature of interpleader brought pursuant to the provisions of 28 U.S.C. §1335.

6. This Court has jurisdiction over the subject matter of this complaint and

counterclaim by virtue of the principles of pendent and ancillary jurisdiction and by virtue of the diversity of citizenship of adverse claimants to securities held by Martin Rubin as escrowee, as hereinafter set forth.

The Guaranty Agreement

7. On March 29, 1977, John M. Shaheen ("Shaheen"), a defendant and respondent in this action, entered into a guaranty agreement with counterclaim defendant Macmillan. A copy of that agreement (the "guaranty agreement") is annexed as Exhibit A to the affidavit of Martin Rubin (the "Rubin affidavit") sworn to October 24, 1980 and previously submitted in this action.

8. Pursuant to the guaranty agreement, Shaheen guaranteed the indebtedness of certain companies to Macmillan. To

secure payment of the companies' obligations, Shaheen "deposited, pledged, [gave] a security interest in and delivered to Macmillan" certain properties to be held by an escrowee. The escrowee's obligations under the guaranty agreement were solely the following:

> (1) Upon receipt of written notice from Macmillan that Macmillan has given Guarantor [Shaheen] the thirty (30) days' written notice specified in A above and Guarantor has failed to cure within such period as specified therein or upon receipt of written notice from Macmillan that Guarantor is in default under B above, Escrowee shall on seven days' written notice by Certified Mail to Guarantor at the address designated with the signature below release and deliver the Collateral to Macmillan.
>
> (2) Upon receipt of written notice from Guarantor that the Indebtedness has been paid in full, Escrowee shall on seven (7) days' written notice by Certified Mail to Macmillan release and deliver the Collateral to Guarantor.

9. Rubin was appointed escrowee under the guaranty agreement.

10. At the time Rubin agreed to serve as escrowee, he was not informed, and he did not know, that Shaheen was a defendant in this action. He did not become aware of that fact until he was served with papers in this proceeding.

11. Rubin presently holds, pursuant to the guaranty agreement, the following securities (the "Securities"):

100 common shares	Shaheen Natural Resources Company Inc.
207,343 common shares	Founders Corporation
896,047 common shares	Can-Amera Export Refining Co., Ltd.
1,304 common shares	Macmillan Ring-Free Oil Co., Inc.
30,000 preferred shares	SNR Holdings, Inc.
252,248 common shares	SNR Holdings, Inc.
95 common shares	Alberta Export Refining Co. Ltd.

67 common shares	Macmillan Ring-Free Oil Co. Inc.
142 preferred shares	Macmillan Ring-Free Oil Co. Inc.

The Claim of Clarkson Company Limited and the Sheriff of the City of New York

12. The first Rubin learned of any dispute about the ownership of the Securities was on September 12 of this year when he was served with a restraining notice signed by White & Case on behalf of Clarkson. The notice directed Rubin not to transfer or to permit interference with any property of Shaheen except as provided in Section 5222 of the New York Civil Practice Law and Rules. A copy of that restraining notice is annexed as Exhibit B to the Rubin affidavit.

13. On September 18, 1980, Rubin was served with a levy and Execution with Notice to Garnishee, signed by the

Sheriff, again obtained by Clarkson, directing him to transfer to the Sheriff personal property in which Shaheen has an interest. Copies of that levy and Execution with Notice are annexed as Exhibit C to the Rubin affidavit.

The Claim of Macmillan Ring-Free Oil Co.

14. On or about October 2, 1980, Rubin received a letter from John Trubin of the firm of Trubin Sillcocks Edelman & Knapp. Mr. Trubin stated his firm represents Macmillan and said that:

> "Recently we received notice that you have been served with an attachment and notice of levy in an action entitled The Clarkson Company, Ltd. et al. v. John M. Shaheen, et al. with respect to property belonging to Mr. Shaheen. Macmillan's security interest in the stock collateral you are holding is prior in time and senior to any such attachment or levy. Macmillan therefore instructs you not to turn over the stock collateral to the sheriff or any other third party.

A copy of Mr. Trubin's letter is annexed as Exhibit D to the Rubin affidavit.

15. On October 24, Rubin received a second letter from the Trubin firm. It informed him that if he released the Securities to a receiver, the Sheriff or any other party, Macmillan would hold him personally liable for that release. A copy of that letter is annexed as Exhibit E to the Rubin affidavit.

Rubin's Position as Stakeholder

16. Rubin has no personal stake in the outcome of the dispute between the claimants. His sole interest in the escrowed securities is his claim for the charges, legal fees, disbursements and other costs of this action.

17. By virtue of the conflicting claims described in paragraphs 12 through 15 of this counterclaim, Rubin is in

great doubt as to which party is entitled to the Securities.

18. Rubin is in a dangerous and doubtful position and cannot safely determine to whom he is required to pay or deliver the Securities. Rubin therefore may be exposed to multiple suits and multiple liability.

WHEREFORE Rubin prays that this court:

(1) Permit Rubin to pay and deliver into this Court the Securities he holds in escrow, pending the outcome of this proceeding;

(2) Require counterclaim defendants Macmillan and the Sheriff to interplead and set up their claims to the Securities;

(3) Adjudge the respective claims of Clarkson, Macmillan and the Sheriff to the property at issue;

(4) Discharge and relieve Rubin from all liability in the premises;

(5) Restrain Clarkson, Macmillan and the Sheriff from instituting or prosecuting any proceeding against Rubin affecting the

Securities other than this interpleader action;

(6) Award Rubin his costs, including legal fees, disbursements and other proper charges against the parties; and

(7) Grant such other and further relief as to this Court seems just and proper.

KORNSTEIN MEISTER & VEISZ
Attorneys for Respondent-Interpleading Counter-claimant Martin Rubin

By /s/ Ronald W. Meister
Ronald W. Meister
405 Lexington Avenue
New York, New York 10174
(212) 599-2700

October 30, 1980

[CAPTION OMITTED]

ANSWER TO THE INTERPLEADER COMPLAINT OF MARTIN RUBIN

Counterclaim defendant, Macmillan Ring-Free Oil Co., Inc. ("Macmillan"), by its attorneys Trubin Sillcocks Edelman & Knapp as and for its answer to the interpleader complaint alleges as follows:

1. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 1, 4, 10, 11, 12, 13, 17 and 18 of the interpleader complaint.

2. Admits the allegations of paragraphs 2, 3, 4, 5, 6, 7, 9, 14, 15 and 16 of the interpleader complaint.

3. Denies each and every allegation of paragraph 8 of the interpleader complaint except admits that John M. Shaheen ("Shaheen") entered into a Guaranty Agreement to guarantee the indebtedness of certain companies to Macmillan and

that to secure payment of the companies' obligations Shaheen "deposed, pledged, [gave] a security interest in and delivered to Macmillan" certain properties to be held by an escrowee and that the escrowee's obligations are those provided for under the Guaranty Agreement.

4. Admits on information and belief the truth of the allegations of paragraph 11 of the interpleader complaint.

COUNTERCLAIM AGAINST MARTIN RUBIN AND CROSS CLAIMS AGAINST THE CLARKSON COMPANY LIMITED, JOHN M. SHAHEEN, AND THE SHERIFF OF THE CITY OF NEW YORK, NEW YORK COUNTY DIVISION

5. Upon information and belief, on July 22, 1980, The Clarkson Company Limited ("Clarkson") as Trustee in Bankruptcy, appointed by the Supreme Court of the Province of Newfoundland, of the property of Newfoundland Refining Company Limited and Provincial Refining Company Limited, as plaintiff, recovered a judgment in an action in Federal District

Court in the Southern District of New York against John M. Shaheen, as defendant for the sum of $23,151,915.00, together with interest at the rate of six percent from March 13, 1976 and for the sum of $23,073,793.00, together with interest at the rate of six percent from July 1, 1980 (the "Judgment").

6. Upon information and belief, on September 11, 1980 Clarkson issued an execution on the property of John M. Shaheen to the Sheriff of the City of New York.

7. Upon information and belief, the Sheriff served respondent Martin Rubin ("Rubin") with a restraining notice and notice of levy on or about September 10, 1980.

8. Upon information and belief, respondent Martin Rubin holds the following shares of stock ("the Stock") which belong to Macmillan:

(1) 896,047 shares of stock of Can-Amera Export Refining Company Ltd.;

(2) 30,000 shares of preferred stock and 252,248 shares of common stock of SNR Holdings, Inc.;

(3) 100 shares of stock of Shaheen Natural Resources Co., Inc.;

(4) 207,343 shares of stock of Founders Corporation;

(5) 1,513 shares of stock of Macmillan Ring-Free Oil Co., Inc.;

(6) 95 shares of stock of Alberta Export Refining Co., Ltd.

9. Rubin is holding the Stock as escrow agent under a Guaranty agreement dated March 29, 1977. Under the Guaranty Agreement the Stock is collateral for loans made by Macmillan which are guaranteed by Shaheen.

10. The present amount of the indebtedness guaranteed by Shaheen and

secured by the Stock is $6,018,932.00 and upon information and belief exceeds the value of the Stock.

11. Macmillan's security interest in the Stock is prior in time and senior to any interest of Clarkson and the Sheriff of the City of New York.

12. On or about September 30, 1980 Macmillan notified Shaheen pursuant to the terms of the Guaranty Agreement that he was in breach of the Guaranty Agreement and had 30 days from receipt of this notice to cure the breach.

13. More than 30 days have passed since Macmillan's notice to Shaheen of his breach of the Guaranty Agreement and Shaheen has failed to cure the breach.

14. By letter dated November 13, 1980 Macmillan notified Rubin that more than 30 days had elapsed since Shaheen's breach under the Guaranty Agreement and that the breach had not been cured and

that Macmillan was as a result under the terms of the Guaranty Agreement, entitled to possession of the collateral 7 days after receipt of this notice by Rubin.

15. Pursuant to the terms of the Guaranty Agreement Macmillan is entitled to possession of the Stock and entitled to apply it towards the indebtedness guaranteed by Shaheen.

WHEREFORE, counterclaim defendant Macmillan demands that a judgment be entered against Rubin, Clarkson, Shaheen and the Sheriff of the City of New York pursuant to CPLR 5239 determining:

1. That the Stock is collateral validly pledged to Macmillan in which Macmillan has a prior and senior interest to Clarkson;

2. That the Stock cannot be applied to the satisfaction of the judgment obtained by Clarkson;

3. Releasing the Stock from the levy of the Sheriff;

4. Holding that Macmillan is entitled to immediate possession of the Stock and to apply the Stock towards the indebtedness guaranteed by Shaheen;

5. Awarding Macmillan its costs and disbursements in this action; and

6. Granting such other and further relief as to this Court seems just and proper.

Dated: New York, New York
November 19, 1980

TRUBIN SILLCOCKS EDELMAN
& KNAPP

By /s/Roger Crane, Jr.
For the Firm
Attorneys for Counterclaim
Defendant Macmillan
Ring-Free Oil Co., Inc.
Office & P.O. Address
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(212) 759-5400

Counterclaim defendant Macmillan demands trial by jury of all the issues in this proceeding.

TRUBIN SILLCOCKS EDELMAN
& KNAPP

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375 Park Avenue
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(212) 759-5400

[CAPTION OMITTED]

ANSWER TO THE CROSS CLAIM OF MACMILLAN RING-FREE OIL CO., INC.

Petitioner, The Clarkson Company Limited ("Clarkson"), as Trustee in Bankruptcy, appointed by the Supreme Court of the Province of Newfoundland, of the Property of Newfoundland Refining Company Limited and Provincial Refining Company Limited, by its attorneys, White & Case, as and for its answer to the cross claim of Macmillan Ring-Free Oil Co., Inc. ("Macmillan") alleges as follows:

1. Admits the allegations of paragraph 5 that on July 22, 1980, a judgment was entered in the Federal District Court in the Southern District of New York in favor of the Clarkson Company Limited ("Clarkson") as Trustee in Bankruptcy, appointed by the Supreme Court of the

Province of Newfoundland, of the property of Newfoundland Refining Company Limited and Provincial Refining Company Limited, as plaintiff, and against John M. Shaheen, as defendant, for the sum of $23,151,915.00, together with interest at the rate of six percent from March 13, 1976 and for the sum of $23,073,793.00, together with interest at the rate of six percent from July 1, 1980 ("the Judgment").

2. Admits the allegations of paragraph 6.

3. Denies the allegations of paragraph 7 but admits that Clarkson caused a restraining notice to be served on respondent Martin Rubin on September 10, 1980 and admits, on information and belief, that the sheriff served a notice of levy on the respondent Martin Rubin on September 19, 1980.

4. Admits on information and belief the allegation of paragraph 8 that the shares of stock are in the possession of Martin Rubin but denies that the shares of stock belong to Macmillan.

5. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 9, 10, 12, 13 and 14.

6. Denies the allegations of paragraphs 11 and 15.

COUNTERCLAIM AGAINST
MACMILLAN RING-FREE OIL CO., INC.

1. Petitioner repeats and realleges the allegations contained in paragraphs 1 through 10 of its Petition filed October 23, 1980 (the "Petition") with the same force and effect as if fully set forth at length herein.

2. Clarkson commenced the main action herein in which it obtained the Judgment against John M. Shaheen by personal

service of a summons and complaint on John M. Shaheen on or about March 23, 1976. At all times subsequent thereto John M. Shaheen has been a defendant in said action and/or the Judgment has been docketed against him.

3. On information and belief, Macmillan's claim to the assets of John M. Shaheen held by Martin Rubin is based on the claim that John M. Shaheen purportedly entered into a Guaranty dated March 29, 1977 ("Guaranty dated March 29, 1977") by which he allegedly conveyed to Macmillan an interest in the property described in paragraph 9 of the Petition which, on information and belief, now is in the possession of Martin Rubin.

4. The purported conveyance, if any, by John M. Shaheen of an interest in the property described in paragraph 9 of the Petition was made with intent to delay, hinder or defraud creditors; without fair

consideration; at a time when John M. Shaheen was insolvent or thereby rendered insolvent, when he intended to, and/or believed that he would, incur debts beyond his ability to pay as they mature and when he was a defendant in this action. Macmillan did not give fair consideration for such purported conveyance and knew at the time of the purported conveyance that it was made in fraud of creditors.

5. The purported conveyance, if any, by John M. Shaheen of an interest in the property described in paragraph 9 of the Petition was made in fraud of creditors.

6. Clarkson's rights to the property described in paragraph 9 of the Petition are superior to the rights of Macmillan, if any, to such property, and any rights of Macmillan must be subordinated by this court of equity to the rights of Clarkson.

WHEREFORE, the petitioner demands the following relief:

(A) a judgment be entered pursuant to Rule 69(a), F.R.Civ.P., and CPLR 5225(b) and (c) against the respondents Martin Rubin and John M. Shaheen and against counterclaim defendant Macmillan Ring-Free Oil Co., Inc. requiring Martin Rubin to deliver to a receiver, if one is appointed by the Court on motion of The Clarkson Company Limited, or if none is appointed, to the Sheriff of the City of New York, New York County Division, all property in his possession or control in which John M. Shaheen has a proprietary interest including the following described property:

(1) 896,047 shares of stock of Can-Amera Export Refining Company, Ltd.;

(2) 30,000 shares of preferred stock and 252,248 shares of common stock of SNR Holdings, Inc.,;

(3) 100 shares of stock of Shaheen Natural Resources Co., Inc.;

(4) 207,343 shares of stock of Founders Corporation;

(5) 1,371 shares of common stock and 142 shares of preferred stock of Macmillan Ring-Free Oil Co., Inc.;

(6) 95 shares of stock of Alberta Export Refining Co., Ltd;

(B) a judgment be entered setting aside and annulling the Guaranty dated March 29, 1977 and the purported conveyance to Macmillan Ring-Free Oil Co., Inc., of an interest in any of the property described in Item A above;

(C) a judgment be entered pursuant to Rule 69(a), F.R.Civ.P., and CPLR 5225(b) and (c) against counterclaim

defendant Macmillan Ring-Free Oil Co., Inc., determining that the right of The Clarkson Company Limited to the property described in Item A above is superior to that of Macmillan Ring-Free Oil Co., Inc.;

(D) an order be entered directing the respondents John M. Shaheen and Martin Rubin and counterclaim defendant Macmillan Ring-Free Oil Co., Inc. to execute and deliver any documents necessary to effect the delivery referred to in item A above; and

(E) such other relief as to the court may seem just and proper, together with the costs and disbursements of this proceeding.

Dated: New York, New York
November 26, 1980

WHITE & CASE

By Jeffrey Barist
A Member of the Firm

Attorneys for Petitioner The
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